

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 25 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0112-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOSHUA W. POLSON,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007135959001DT

Honorable Colleen L. French, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Arthur Hazelton

Phoenix
Attorneys for Respondent

Joshua Polson

Buckeye
In Propria Persona

BRAMMER, Judge.

¶1 Petitioner Joshua Polson seeks review of the trial court’s summary denial of his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but deny relief.

¶2 After a jury trial, Polson was convicted in February 2008 of possession of dangerous drugs for sale, possession of drug paraphernalia, second-degree escape, and two counts of weapons misconduct. The trial court found he had two or more historical prior felony convictions and sentenced him to enhanced terms of imprisonment, some concurrent and some consecutive, totaling fifteen years. Another department of this court affirmed his convictions and sentences on appeal. *State v. Polson*, No. 1 CA-CR 08-0156 (memorandum decision filed Dec. 22, 2009).

¶3 In April 2008, Polson filed a pro se notice of post-conviction relief in which he informed the trial court that he wished to decline the appointment of counsel and proceed pro se. He was granted sixty days to file his petition, but he never did so, and the court dismissed the proceeding on July 21, 2008.¹

¶4 In June 2010, Polson filed a successive notice of post-conviction relief, and counsel was appointed at his request. In the petition that followed, Polson claimed his trial counsel had been ineffective in “fail[ing] to address and deal with [his] serious mental health condition” that had “precluded [him] from making a competent decision on

¹Based on the record before us, Polson did not seek this court’s review of that dismissal.

taking a plea agreement.”² In support of his petition, he submitted a December 2010 psychological evaluation prepared by psychologist Carlos A. Jones, who detailed Polson’s history of mental health diagnoses and found Polson was “not feigning the presence of mental illness, but is exaggerating and inconsistent in his reporting of his symptoms.” In response to Rule 32 counsel’s questions, Jones also opined that Polson was likely to have had a mental disorder at the time of his plea negotiations and that disorder was likely to have affected his “reasoning and decision-making” faculties.

¶5 The trial court denied relief, concluding Polson’s claim of ineffective assistance of counsel was precluded by his failure to raise it in his first Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from Rule 32 relief based on any ground “[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding”). The court noted that Polson had stated “no reason why this claim should not now be precluded” and had “not even allege[d] that this claim falls within any of the exceptions to preclusion” found in Rule 32.2(b). In addition, the court addressed Polson’s argument on its merits and found he had failed to state a colorable claim for relief.

¶6 In his pro se petition for review, Polson challenges the trial court’s summary denial of his ineffective assistance of counsel claim, arguing the claim should not have been precluded because it was based on “newly discovered material facts.” *See*

²Before trial, Polson rejected the state’s offer of a plea agreement that included a stipulated sentence of nine calendar years, followed by a period of community supervision.

Ariz. R. Crim. P. 32.1(e). He maintains his claim is also excepted from preclusion under Rule 32.1(f), because he “became confused and paranoid due to [his] mental illness” and he therefore was without fault for “any mistakes [or] missed filings” in his previous proceeding. We will not address these arguments because they have been raised for the first time in Polson’s petition for review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *see also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (issues may not be raised for first time in petition for review).³ His arguments challenging the court’s ruling on the merits of his claim are similar to those raised in his petition for review.

¶7 We review a trial court’s summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here. We agree with the court’s determination that Polson’s claim is precluded by his failure to raise it in his first Rule 32 proceeding. *See State v. Shrum*, 220 Ariz. 115, ¶¶ 5-6, 23, 203 P.3d 1175, 1177, 1180 (2009) (recognizing “preclusive effect” when Rule 32 proceeding is dismissed). The court’s ruling clearly identified Polson’s

³In addition, the exceptions to preclusion proposed by Polson clearly lack merit. To afford relief pursuant to Rule 32.1(e), “the evidence must have existed at the time of trial, but have been discovered after trial,” *State v. Pac*, 175 Ariz. 189, 192, 854 P.2d 1175, 1178 (App. 1993); facts known by a defendant at the time of trial are not “newly discovered” for the purpose of Rule 32.1(e), *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000). Rule 32.1(f) provides a ground for relief when a pleading defendant has failed to file a timely notice of post-conviction relief of right. Ariz. R. Crim. P. 32.1(f). It has no application to a non-pleading defendant or a defendant who has failed to file a petition once a timely notice has been filed. *See id.*; *State v. Diaz*, 228 Ariz. 541, ¶ 10, 269 P.3d 717, 720 (App. 2012).

arguments and correctly ruled on them in a manner that will allow any other court to understand their resolution. We see no need to restate the court's analysis here; instead, we approve and adopt its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶8 Accordingly, we grant review but deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge